Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SCOTT ERRICO,

Petitioner,

v.

GULF CORRECTIONAL INSTITUTION,
Warden, Gulf Correctional Institution,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the practice of issuing unpublished opinions that have precedential weight creates a secret jurisprudence that prejudices litigants' ability to know what are their rights and obligations under the law.

II. Whether the constitutional guarantee of access to courts can be sustained where the states are permitted to mislead prisoners concerning the deadlines for filing habeas corpus petitions.

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Petitioner Scott Errico respectfully petitions for a writ of certiorari to review the Order of the Eleventh Circuit Court of Appeals affirming the order of the United States District Court for the Southern District of Florida denying Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

OPINIONS BELOW

The order of United States District Court for the Southern District of Florida denying Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is unpublished (App. B). The decision of the Eleventh Circuit Court of Appeals affirming the order of the District Court in also unpublished (App. A).

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered judgment in Case No. 02-12050-FF on February 7, 2003 (App. A). Petitioner's petition for rehearing en banc was denied on April 29, 2003 (App. C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution: Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject

for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution: Amendment XIV

Section 1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2244

(d)(1) a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

* * *

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.

STATEMENT OF THE CASE

1. Proceedings before the Florida State Courts

On January 23, 1985, petitioner was charged by the State of Florida with two counts of first degree murder and two counts of kidnaping. In May of 1990, Petitioner was tried for murder. That trial ended in a hung jury 11-1 for acquittal. In March of 1991, Petitioner was found guilty of first degree murder and kidnaping and sentenced to two consecutive life sentences. Appellant's conviction was upheld by the Fourth District Court of Appeal. *State v. Errico*, 608 So. 2d 930 (Fla. 4th DCA 1992), *rev. denied*, 617 So. 2d 319 (Fla. 1993), *cert. denied*, 617 So. 2d 319 (1993).

In early 1996, Petitioner filed a motion for post-conviction relief pursuant to Fla. R. Crim. 3.850. That motion was denied on June 6, 1996 and the order of the circuit court was upheld on August 21, 1996. *Errico v. State*, 678 So. 2d 1298 (Fla. 4th DCA 1996). On April 1, 1997, Petitioner filed a petition for writ of habeas corpus to the Fourth District Court of Appeal. That petition was denied on August 1, 1997. On December 22, 1997, Petitioner filed a second petition for writ of habeas corpus to the Fourth District Court of Appeal. The Fourth District denied the petition on June 8, 1998 and the Supreme Court of Florida denied review on March 10, 1998.

2. Proceedings before United States District Court

On March 3, 1999 Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 with the District Court for the Southern District of Florida. In the Petition filed before the Federal District Court, Petitioner raised five

claims for relief: (1) that the prosecution violated his Sixth Amendment right to counsel by using Patrick Menillo to elicit incriminating statements while the two of them were housed together in the Broward County Jail; (2) that the prosecution engaged in misconduct by using the co-defendant in such a manner; (3) that the prosecution had withheld from the defense some of the statements made by him to the co-defendant; (4) that his trial counsel had a conflict of interest because he had previously represented the codefendant; and (5) that one of the jury instructions had been improperly promulgated under Florida law and violated his due process rights by shifting the burden of proof. The District Court made no findings as to any of the issues raised in the Petition. The Court found that the petition was untimely, relying in part upon an unpublished decision of the Eleventh Circuit Court of Appeals. That petition was denied on March 29, 2002. Notice of Appeal was timely filed. A certificate of appealability was issued by the District Court.

3. Proceeding before the Panel of the Eleventh Circuit Court of Appeals

On appeal, Petitioner argued that he was entitled to rely upon advice provided by inmate law clerks. Pursuant to that advice, Petitioner delayed filing his petition for post conviction relief until all state claims were exhausted. To the extent that his petition was untimely, Petitioner claimed the failure to file earlier was excused under the doctrine of equitable tolling. In addition, Petitioner relied upon the provision of Section 2244 permitting the filing of a petition beyond the one year time limit where there was a constitutional impediment resulting from state action. Because the state had a duty not to mislead prisoners and because Petitioner was misled by advice given by inmates

trained and provided by the Bureau of Prisons, Petitioner claimed he should be permitted to rely upon the advice given and the petition was therefore timely. On February 7, 2003, the Eleventh Circuit Court of Appeals issued an unpublished opinion affirming the District Court.

4. Proceedings before the En Banc Court

In the Petition for Rehearing En Banc, Petitioner argued that the panel's decision was in conflict with the constitutional guarantee of access to courts under the decisions of this Court in *Bounds v. Smith*, 430 U.S. 817 (1977) and *Arizona v. Casey*, 518 U.S. 343 (1996) and the principle of equitable tolling under the decision of this Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) (Point I on Appeal). Petitioner further argued that the Panel's decision should be published and that the court's failure to do so created a secret jurisprudence that denied prisoners rights without notice (Point II on Appeal).

REASONS FOR GRANTING THE PETITION

I.

THE PRACTICE OF ISSUING UNPUBLISHED OPINIONS THAT HAVE PRECEDENTIAL WEIGHT CREATES A SECRET JURISPRUDENCE THAT PREJUDICES LITIGANTS' ABILITY TO KNOW WHAT ARE THEIR RIGHTS AND OBLIGATIONS UNDER THE LAW

The creation of a body of jurisprudence which is both hidden from the public and which exercises great influence over the decisions of the federal courts is inimical to a free society. It is thus of vital importance to the perceived fairness and integrity of the judiciary that this Court resolve the controversy over how such decisions may be used. Indeed, in *Anastoff v. United States*, 235 F.3d 1054, 1056 (8th Cir. 2000), the Eight Circuit sitting en banc stated that, "The controversy over the status of unpublished opinions is . . . of great interest and importance . . ." And *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001), repeatedly notes the scholarly debate over the practice. *See, e.g.*, Richard S. Arnold, *Unpublished Opinions, A Comment*, 1 J. App. Prac. & Process 219 (1999) and Melissa H. Weresh, *The Unpublished, Non-Precedential Decision: An Uncomfortable Legality?*, 3 J. Appl. Prac. & Process, 175 (2001).

In rendering its opinion in this case, the District Court relied upon an unpublished decision of Eleventh Circuit Court of Appeal. In its ruling in this very case, the panel ordered that its opinion not be published. Pursuant to Rule 36-2, unpublished opinions are considered persuasive authority. This places unpublished decisions on the level of other decisions of the federal circuit courts. But published decisions of other federal

circuit courts are readily available to the public. Unpublished decisions are not available to prisoners. Thus no amount of research by prisoners or even attorneys is likely to reveal the existence of a body of jurisprudence known only to the courts and the state.

In *Hart v. Mossanari*, 266 F.3d 1155 (9th Cir. 2001), Judge Kozinski eloquently defended the practice of issuing unpublished opinions as both constitutional and necessary in an era of exploding judicial caseloads. But unpublished opinions carry no precedential weight in the Ninth Circuit and cannot even be cited to the court. 9th Cir. R. 36-3. This is also the rule in the First Circuit, 1st Cir. R. 36(2)(F) and the Seventh Circuit, 7th Cir. R. 53(b)(2)(iv). In contrast to the practice in the First, Seventh, and Ninth Circuits, unpublished opinions may be cited to the court and can be considered of persuasive value in the Fourth Circuit, 4th Cir. R. 28(b); Sixth Circuit, 6th Cir. R. 28(g); Eighth Circuit, 8th Cir. R. 28A(i); Tenth Circuit, 10th Cir. R. 36.3(b); and the Eleventh Circuit; 11th Cir. R. 36-2. In the Fifth Circuit, unpublished decisions issued before January 1, 1996 are considered binding precedent. Fifth Cir. R. 47.5.3. After that date they are considered persuasive authority. Fifth Cir. R. 47.5.4. The United States Court of Appeals for the District of Columbia Circuit takes a position opposite to that of the Fifth. In the District of Columbia Circuit Court, unpublished decisions entered before January 1, 2002 may not be cited as precedent. Unpublished decisions entered after that date are binding precedent. CADC R. 28(c)(1)(A) and (B). In individual cases the Second and Third Circuits will consider unpublished opinions as persuasive. *Acosta v. Artuz*, 221 F.3d 117, 123 n.4 (2d Cir. 2000); *United States v. Skandier*, 125 F.3d 178, 181 (3d Cir. 1997).

Plainly the rules governing the use of unpublished decisions are in conflict. But more importantly, those circuits which permit the use of unpublished opinions as either binding precedent or persuasive authority have created a body of law which is unknowable to all but a select few. Without notice of the requirements of the law, citizens cannot be expected to conform their conduct to the law. As this very case illustrates, prisoners in Florida jails act at their own peril since they cannot know what their rights and responsibilities are. To the extent that unpublished opinions serve the needs of judicial efficiency, the use of unpublished opinions as precedent, either binding or persuasive, leads to unnecessary litigation, confusion in the law, and a waist of judicial resources.

Notice is the hallmark of due process. Fundamentally a system of justice that denies the citizenry access to all the law is a system where the right due process becomes a function of whim and caprice. *City of West Covina v. Perkins*, 525 U.S. 234, 242 (1999).

II.

THE CONSTITUTIONAL GUARANTEE OF ACCESS TO COURTS CANNOT BE SUSTAINED WHERE THE STATES ARE PERMITTED TO MISLEAD PRISONERS CONCERNING THE DEADLINES FOR FILING HABEAS CORPUS PETITIONS

Persons incarcerated in the prisons of the various states have a constitutional right to access to courts. *Bounds v. Smith*, 430 U.S. 817 (1977). Though there is no single formula to insure that right, it is unconstitutional for states to create barriers to its exercise. *Arizona v. Casey*, 518 U.S. 343 (1996). Indeed, in *Monge v. Straub*, 815 F.2d 1467

(11th Cir. 1987) the Eleventh Circuit Court of Appeals recognized that the right to access to courts means meaningful access and that prisons have an affirmative obligation to insure meaningful access. *Id.* at 470.

The record below reflects that inmate law clerks erroneously advised Petitioner to delay filing a Section 2254 petition until he had exhausted all possible state claims. That advice was given by inmate law clerks trained by and provided to prisoners by the State of Florida in order to comply with the decision of this Court in *Arizona v. Casey*, *supra*. The Eleventh Circuit held that Petitioner could not rely upon such advice since these clerks are provided only to "assist inmates in completing forms and conducing research." Panel Op. 9.

The decision of the Eleventh Circuit conflicts with decisions of this Court and other circuits recognizing that equitable tolling can apply where a litigant has relied to his disadvantage on the representations of his adversary. *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (footnotes omitted) (recognizing that equitable tolling has been applied where the petitioner "has actively pursued his judicial remedies by filing a defective proceeding during the statutory period, or where the [petitioner] has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."); *Johnson v. United States Postal Serv.*, 861 F.2d 1475, 1481 (10th Cir. 1988) (equitable tolling may be appropriate where a petitioner has been deceived by an incorrect representation by an adversary, court or agency).

The failure of the United States District Court and the Eleventh Circuit Court of Appeals to apply the doctrines of equitable tolling and constitutional impediment under the

facts presented herein denied Petitioner his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments. Moreover, the position taken by the courts below threaten to undermine the carefully crafted statutory scheme governing the litigation of habeas corpus petitions before the federal courts. While it is true that Congress sought to reduce the number of prisoner petitions being filed years following their conviction, nothing in the legislative scheme indicates Congressional intent to give states the power to trap prisoners into filing untimely petitions. Indeed 28 U.S.C. § 2244(d)(1)(B) excuses late filing of petitions where the state has created impediments to the timely filing of petitions. Fundamentally, if the states are permitted to mislead prisoners as to their rights to file for relief under 28 U.S.C. § 2254, then the protections guaranteed by the statute will become meaningless.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED FEBRUARY 7, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-12050
Non-Argument Calendar

D. C. Docket No. 99-06295-CV-AJ

SCOTT NICHOLAS ERRICO,

Petitioner-Appellant,

versus

GULF CORRECTIONAL INSTITUTION,
Warden, Gulf Correctional Institution,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 7, 2003)

Before EDMONDSON, Chief Judge, BARKETT and HULL, Circuit Judges.

Appendix A

PER CURIAM:

Petitioner-Appellant Scott Nicholas Errico, a Florida prisoner, appeals through counsel the district court's order denying as untimely his petition for habeas corpus relief, filed pursuant to 28 U.S.C. § 2254. Because Errico filed his petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-32,110 Stat. 1214 (1996), its provisions govern this appeal. No reversible error has been shown; we affirm.

In 1991, Errico was convicted in the State of Florida of premeditated murder and kidnapping and sentenced to two consecutive life sentences. Errico then filed several unsuccessful direct and collateral appeals in state court. On 3 March 1999, Errico filed the instant § 2254 petition. The state responded that Errico's petition was untimely. The magistrate judge, in turn, filed a report and recommendation, recommending that Errico's § 2254 petition be denied as untimely.[1]

Errico objected to the magistrate judge's recommendation. Errico argued that his untimely filing was the result of his receiving erroneous information from "persons acting on behalf of the state," that is, advice from inmate law clerks that his petition had to be filed within one year after the exhaustion of all of his state claims. He asserted that the inmate law clerks were agents of the state because they received training and certification from the state. And he attached supplemental

1. Although the parties disagree on whether the district court should have equitably tolled the time for filing the § 2254 petition, neither party disputes on appeal that, in the absence of equitable tolling, Errico's § 2254 petition was untimely.

affidavits from two certified inmate law clerks, attesting that they misinterpreted the AEDPA's filing requirements as the result of a lack of training or supervision and, as such, misadvised Errico regarding these requirements.

The magistrate judge responded by filing a second report and recommendation, again recommending that the petition should be denied as untimely. The magistrate judge found that the inmate law clerks were not acting as agents for the state and that Errico had not shown that his filing period should be equitably tolled. Errico objected by raising the same equitable-tolling arguments and also by asserting that the state provided inadequate library materials because the volume of the U.S. Code containing the AEDPA provisions was removed in 1996 and not replaced until 1999.

The district court denied the petition as untimely. The district court determined that nothing was extraordinary about Errico's circumstances and, as such, his time for filing his § 2254 petition should not be equitably tolled. It specifically found that Errico, who was represented by counsel during part of the period during which he had to file his § 2254 petition, did not diligently seek out the AEDPA's limitations period by asking his counsel for this information. And it determined that, although the prison library may have lacked a copy of the relevant volume of the U.S. Code, the library contained a copy of the Federal Civil Judicial Procedures and Rules that contained the habeas statutes, including the AEDPA's limitation period. Errico then filed a notice of appeal, which the district court construed as an application for a certificate of appealability and granted on the issues of equitable tolling and constitutional impediment.

Appendix A

Errico again argues on appeal that equitable tolling of the limitations period for filing his § 2254 petition was appropriate because of the erroneous information he received from inmate law clerks regarding the limitations period and because the prison law library did not contain this information.[2] We review *de novo* both a district court's determination that a petition for federal habeas corpus relief was untimely and its determination that equitable tolling was inapplicable. *Jones v. United States*, 304 F.3d 1035, 1037 (11th Cir. 2002).[3] On the other hand, the district court's determinations of the facts will be reversed only if clearly erroneous. *Dorsey v. Chapman*, 262 F.3d 1181, 1185 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 1567 (2002).

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2. Errico contended below and briefly states on appeal that this situation also created a "constitutional impediment." Pursuant to the AEDPA, if a constitutional impediment created by state action in violation of the Constitution or laws of the United States exists, the petitioner's time for filing his petition does not begin running until the constitutional impediment is removed. *See* 28 U.S.C. § 2244(d)(1)(B). Errico has abandoned this statutory challenge on appeal by failing to develop his argument in his brief. *See Marek v. Singletary*, 62 F.3d 1295, 1298 n.2 (11th Cir. 1995) (issues not clearly raised in the briefs are considered abandoned). Also, Errico has failed to explain how the alleged state action of trained inmates assisting other inmates in filing petitions for collateral relief, albeit incorrectly, constituted a constitutional impediment. Cf. *Lackawanna County Dist. Attorney v. Coss*, 121 S.Ct. 1567, 1575 (2001) (citing to state's refusal, without justification, to rule on a constitutional claim that has been presented properly as an example of a § 2244(d)(1)(B) constitutional impediment).

3. Although *Jones* involved a motion to vacate, filed pursuant to 28 U.S.C. § 2255, we have determined that cases interpreting the equitable tolling of the statute of limitations in § 2244 and § 2255 are equally valid. *See Jones*, 304 F.3d at 1038 n.4.

The AEDPA imposes a one-year limitations period on habeas corpus petitions. 28 U.S.C. § 2244(d)(1). But even if a petition is filed outside of this one-year period, equitable tolling may be applied when "extraordinary circumstances" have worked to prevent an otherwise diligent petitioner from timely filing his petition. *Helton v. Secretary for Dept. of Corrections*, 259 F.3d 1310, 1312 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 1965 (2002). The burden of establishing entitlement to this "extraordinary remedy" rests with the petitioner. *See id.* at 1313-14 (petitioner failed to show a connection between his untimely filing and alleged inadequacies in the prison library).

Equitable tolling typically is applied sparingly. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). Equitable tolling only is justified when "a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence." *See Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (denying equitable tolling based on the inefficiencies of the U.S. Postal Service); *see also Akins v. United States*, 204 F.3d 1086, 1089-90 (11th Cir.) (denying equitable tolling based on the movant's placement in "lock down" and misplaced legal papers), *cert. denied*, 121 S.Ct. 410 (2000); *Drew v. Department of Corrections*, 297 F.3d 1278, 1287-89 (11th Cir. 2002) (denying equitable tolling when petitioner failed to prove that he acted with due diligence in pursuing his § 2254 petition).[4]

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4. In *Knight v. Schofield*, 292 F.3d 709, 711-12 (11th Cir. 2002), the only case in which we have concluded that a petitioner was entitled to equitable relief from the AEDPA's statute of limitations

(Cont'd)

Here, Errico contends that, unlike the petitioner in *Helton*, he made extensive efforts to determine the correct filing date. But Errico was represented by counsel during at least a portion of the relevant time allowable for filing his § 2254 petition. Although this legal representation was related to the filing of Errico's first state habeas petition, the district court did not clearly err in finding that Errico failed to exercise due diligence by not attempting to request from his counsel the relevant AEDPA deadlines. *See Drew*, 297 F.3d at 1283 (a determination regarding a party's diligence is a finding of fact that w e will not disturb unless clearly erroneous).

Even if we determined that Errico exercised due diligence, we have concluded that miscalculations of or misadvise concerning the limitations period for filing a federal habeas petition, albeit by petitioners' attorneys, do not constitute extraordinary circumstances warranting equitable tolling. *See Helton*, 259 F.3d at 1313 (citing to *Steed*, 219 F.3d at 1300). Errico concedes that he had no right to effective assistance of counsel in filing his § 2254 petition. But he asserts that errors by inmate law clerks in Florida are distinguishable from attorney errors because the clerks are trained and certified by the state. These clerks, however, do not have state authority to give legal advice to other inmates; instead, their purpose is to assist inmates in

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(Cont'd)

based on extraordinary circumstances, we determined that the petitioner showed that the Supreme Court of Georgia failed to inform him of the final disposition of his state application after making assurances that it would do so and that the petitioner could not file his § 2254 petition until after his pending state application was denied.

completing forms and conducting research. *See* Fla. Admin. Code § 33-33.0055(1)(i)(1). And the existence of the inmate law clerks did not foreclose Errico from conducting his own research. *Cf. Whiddon v. Dugger*, 894 F.2d 1266 (11th Cir. 1990) (poor advice by inmate law clerks regarding filing period for state collateral relief not cause to bypass procedural default rule because petitioner had neither a right to advice from a state-provided lawyer nor from an inmate law clerk regarding his collateral appeals).

Errico's argument that the absence of AEDPA materials in the prison law library resulted in extraordinary circumstances also is without merit. Errico argues that the prison library failed to carry the current volume of the U.S. Code containing the AEDPA provisions. But Errico failed to challenge the district court's finding that the library contained a copy of the Federal Judicial Procedure and Rules that included the relevant habeas statutes, and he has not shown on appeal that this finding was plainly erroneous. *See LoConte v. Dugger*, 847 F.2d 745, 749-50 (11th Cir. 1988) (magistrate judge's findings of fact, which are adopted by the district court without objection, only may be reviewed for plain error or manifest injustice). Because Errico did not establish that he untimely filed his § 2254 petition based on extraordinary circumstances that were both beyond his control and unavoidable even with diligence, the district court did not err in failing to equitably toll his filing deadline and in denying his petition as untimely. *See Sandvik*, 177 F.3d at 1271.

AFFIRMED.

APPENDIX B — ORDER DISMISSING HABEAS CORPUS PETITION AS UNTIMELY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED MARCH 29, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO. 99-6295-CIV-JORDAN

SCOTT NICHOLAS ERRICO

Petitioner

vs.

STATE OF FLORIDA

Respondent

ORDER DISMISSING HABEAS CORPUS PETITION AS UNTIMELY

Scott Errico's motion for reconsideration of my ruling on equitable tolling and for an evidentiary hearing on that issue [D.E. 60] is DENIED. Nothing that Mr. Errico has submitted persuades me to change my mind, and I believe that an unpublished decision from the Eleventh Circuit supports my ruling. *See Isidor v. Secretary for the Dept. of Corrections,* No. 01-12405, at 2-3 (Oct. 16, 2001) (attached) (misinformation from inmate law clerks and negligence on the part of unlicenced attorney did not warrant equitable tolling of limitations period).

Appendix B

The remaining issue in this case is whether Mr. Errico has made the necessary showing of actual innocence under cases like *Schlup v. Delo,* 513 U.S. 298, 324 (1995), to require examination of whether the Suspension Clause mandates an actual innocence exception to the limitations period set forth in the AEDPA, 28 U.S.C. § 2244(d). *See Wyzykowski v. Dept. of Corrections,* 226 F.3d 1213, 1218-19 (11th Cir. 2000). After reviewing the transcripts of the first and second trials, and considering the parties' memoranda, I conclude that Mr. Errico has not shown that he is actually innocent, and therefore do not reach the Suspension Clause issue. The habeas corpus petition [D.E. 1] is therefore DISMISSED AS UNTIMELY.

The evidence at Mr. Errico's second trial included testimony from two co-conspirators who said they saw Mr. Errico commit murder and testimony from members of Scotland Yard who said that Mr. Errico made incriminating statements to them: (1) the testimony of Patrick Menillo that Mr. Errico – ~~in his presence – shot one of the victims~~ (Robert Vogt) execution style in the head [Tr. 1869], that Mr. Errico told him (while the two were incarcerated together) that he wanted to find some witnesses to have them killed [Tr. 1647, 1648, 1652], and that Mr. Errico told him that he was going to take the stand and lie [Tr. 1655-56]; (2) the testimony of Scotland Yard Inspector Lorne Johnson that, after being arrested at Heathrow Airport for having "flick" knives in his luggage, Mr. Errico identified himself as Stephen Marzovilla and had identification in Marzovilla's name [Tr. 1974-78]; (3) the testimony of Scotland Yard Detective Owen Griffin that Mr. Errico inquired (after he was asked if he was in fact Scott Errico and wanted in the

United States for homicide) if there was any "arrangement" he could come to with Scotland Yard [Tr. 2072-73], that Mr. Errico said he used England as a place to keep his money and come back to [Tr. 2074], that Mr. Errico said that "those motherfuckers [the authorities] ha[d] a pretty good case against [him]" because of numerous snitches [Tr. 2077], that Mr. Errico said "I guess I am" when asked if he was "involved up to [his] neck" [Tr. 2077], that Mr. Errico said that he wanted to avoid the death penalty for the homicides and would plead guilty to drug charges [Tr. 2081-82]; and (4) Robert Tipple's testimony that Mr. Errico – in his presence – shot Mr. Vogt [Tr. 2293-98, 2348-49].

Against this evidence, Mr. Errico presents an excerpt from a book – Jeffrey Robinson, *The Laundrymen* 138-40 (Arcade Publishing 1996) – which states that, several days prior to Mr. Errico's detention at Heathrow Airport, members of Scotland Yard had broken into Mr. Errico's apartment and rummaged through his luggage to find the "flick" knives. According to the book, Scotland Yard knew what to look for when they stopped Mr. Errico at Heathrow Airport, and the detention was therefore pretextual. The book also explains that Scotland Yard detectives duped Mr. Errico into grabbing a glass of water so that they could lift fingerprints off it. Mr. Errico asserts that this newly discovered evidence – the illegal search and the surreptitious fingerprinting – supports his claim of actual innocence because it casts doubt on the trial testimony of the members of Scotland Yard, who said that they complied with English legal rules in dealing with Mr. Errico.

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Mr. Errico also contends that documents obtained recently through a public records request from the State of Florida indicate that Mr. Menillo was trying to obtain information against him at the same time he was cooperating against an individual named Stephen Lippit. Mr. Errico argues that the documents (which include some of Mr. Menillo's notes) show that the State of Florida was aware of Mr. Menillo's attempts to obtain evidence against him.

I do not think these new matters satisfy the *Schlup* actual innocence test in light of the substantial evidence presented against Mr. Errico at the second trial. *See generally Lucidore v. New York State Dept. of Parole,* 209 F.3d 107, 114 (2d Cir. 2000) (rejecting claim of actual innocence and holding that petitioner must show that it was more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt). First, the excerpt from the book is hearsay and is not reliable because it does not name the source of the information. It certainly is not eyewitness testimony or critical physical evidence. Even assuming the excerpt were somehow admissible, it does not name any of the members of Scotland Yard who allegedly searched Mr. Errico's apartment or obtained the fingerprints. Without such information, it is sheer speculation to believe that the excerpt is the type of reliable evidence contemplated by *Schlup*. Second, the notes kept by Mr. Menillo, though maybe additional impeachment material, do not show that Mr. Errico is actually (i.e., factually) innocent. In sum, this is not a case like *Finley v. Johnson,* 243 F.3d 215, 221-22 (5th Cir. 2001), in which the Fifth Circuit found that a petitioner made a sufficient showing of actual innocence in the context of a necessity defense to a charge of aggravated kidnapping.

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Because Mr. Errico has not met his burden of demonstrating actual innocence, I need not decide whether the Suspension Clause requires an actual innocence exception to the AEDPA limitations period. Mr. Errico's petition is untimely, and is therefore DISMISSED. Should he decide to appeal, Mr. Errico is granted a certificate of appealability on the issues of unconstitutional impediment and equitable tolling.

This case is CLOSED.

DONE and ORDERED in chambers at Miami, Florida, this 29th day of March, 2002.

s/ Adalberto Jordan
Adalberto Jordan
United States District Judge

Appendix B

ATTACHMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-12405
Non-Argument Calendar

D.C. Docket No. 00-01896-CV-AJ

PAULY ISIDOR,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS,
Michael W. Moore,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Florida

(October 16, 2001)

Before TJOFLAT, BIRCH AND BLACK, Circuit Judges.

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PER CURIAM:

Pauly Isidor, a Florida state prisoner, appeals the dismissal of his *pro se* habeas corpus petition, 28 U.S.C. § 2254, as barred by the one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-32, 110 Stat. 1214 (1996). Pursuant to the certificate of appealability granted by this court, Isidor argues that the district court should have granted his motion for equitable tolling because the misinformation from inmate law clerks and the negligence of his unlicensed attorney constitute extraordinary circumstances that were beyond his control and unavoidable with due diligence.

We review *de novo* the district court's decision to deny equitable tolling. *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000). Upon review of the pleadings, and upon consideration of the briefs of the parties, we find no reversible error.

The AEDPA's limitations period is subject to the doctrine of equitable tolling, which can excuse the untimely filing of a § 2254 habeas petition. *Sandvik v. United States*, 117 F.3d 1269 (11th Cir. 1999). The doctrine is exercised sparingly and only applies in extraordinary circumstances that are both beyond a prisoner's control and unavoidable even with due diligence. *Id.* at 1271. Mere attorney negligence will not justify a grant of equitable tolling. *Helton v. Secy of the Dep't of Corr.*, 259 F.3d 1310 (11th Cir. 2001), *vacating* 233 F.3d 1322 (11th Cir. 2000).

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We conclude that the district judge did not err in denying Isidor equitable tolling. Isidor failed to show that the untimely filing of his habeas petition resulted from extraordinary circumstances that were both beyond his control and unavoidable with due diligence. Isidor's arguments, attorney negligence and misinformation from inmate law clerks, are insufficient to warrant a grant of equitable tolling. In addition, the unlicensed attorney did not appear to be involved with the post-conviction petition prior to the running of the statute of limitations.[1] Furthermore, Isidor did not establish why he was unable to submit his federal habeas corpus petition until May of 2000, more than twenty-six months after the limitations period. Accordingly, we AFFIRM.

A True Copy – Attested
Clerk, U.S. Court of Appeals
Eleventh Circuit

By s/ [illegible]
Deputy Clerk
Atlanta, Georgia

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1. The record does not indicate the actual date on which Isidor hired the unlicensed attorney. However, the earliest communications in the record are dated beginning November 1997, already well beyond the date by which his state post-conviction relief should have been filed. (R1-4 at exh. A).

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC FILED APRIL 29, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-12050-FF

SCOTT NICHOLAS ERRICO,

Petitioner-Appellant,

versus

GULF CORRECTIONAL INSTITUTION,
Warden, Gulf Correctional Institution,

Respondent-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, Chief Judge, BARKETT and HULL, Circuit Judges.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J. Edmondson
UNITED STATES CIRCUIT JUDGE